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8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
10 AT TACOMA

11 WILLIAM L. PEARCY,

12 Plaintiff,

13 v.

14 MICHAEL J. ASTRUE, Commissioner of  
15 Social Security Administration,

16 Defendant.

No. CASE NO. C08-5573RBL

REPORT AND RECOMMENDATION

Noted for May 1, 2009

17  
18 This matter has been referred to Magistrate Judge J. Richard Creatura pursuant to 28  
19 U.S.C. § 636(b)(1)(B) and Local Magistrates Rule MJR 4(a)(4) and as authorized by Mathews,  
20 secretary of H.E.W. v. Weber, 423 U.S. 261 (1976). Plaintiff, William Percy, brought this  
21 action pursuant to 42 U.S.C. § 405(g) seeking judicial review of a final decision of the  
22 Commissioner of Social Security denying his applications for disability benefits under Title II of  
23 the Social Security Act, 42 U.S.C. §§ 401-33, and Title XVI of the Social Security Act, 42  
24 U.S.C. §§ 1381-1383f.  
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1 This matter has been briefed, oral argument was heard on April 7, 2009, and after  
2 reviewing the record, the undersigned recommends that the Court affirm the administrative  
3 decision.

#### 4 INTRODUCTION AND PROCEDURAL HISTORY

5 Born in October 1984, Plaintiff was 20 years old on his amended alleged onset date of  
6 disability. He completed the ninth grade, received a GED, and attended DeVry University for  
7 approximately one year. Plaintiff has past relevant work experience as a janitorial assistant,  
8 receptionist, housekeeper, laborer, dishwasher, and grocery bagger. According to a psychiatric  
9 assessment, dated January 17, 2006, Plaintiff has a background history of anti-social behavior  
10 and extensive involvement in the criminal justice system.

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12 Plaintiff filed his applications for disability benefits on July 27, 2006 (Tr. 112-18, 119-  
13 23). For purposes of establishing entitlement to benefits under Title II, Plaintiff had insured  
14 status through September 30, 2006 (Tr. 125). Mr. Percy claims disability due to an anxiety  
15 disorder, depression and back problems. He originally alleged disability beginning January 1,  
16 2004. However, Mr. Percy later amended his alleged disability onset date to February 1, 2005,  
17 when he stopped working as a courtesy clerk at Safeway (Tr. 30).

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19 Plaintiff's applications were denied initially and upon reconsideration (Tr. 69-72, 74-77,  
20 79-82). Plaintiff then requested a hearing before an ALJ (Tr. 88). On July 6, 2007, the ALJ  
21 heard testimony from Plaintiff and Olaf Eagleson, a vocational expert (Tr. 27-36). On  
22 November 27, 2007, the ALJ issued a decision applying the five-step sequential evaluation  
23 process and finding that Plaintiff was not disabled (Tr. 7-26). 20 C.F.R. §§ 404.1520, 416.920.  
24 At step one, the ALJ found that Plaintiff had not engaged in substantial gainful activity since  
25 February 1, 2005. At step two, the ALJ found that depressive disorder, not otherwise specified;  
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1 rule out bipolar disorder; anxiety disorder, and; rule out post-traumatic stress disorder were  
2 severe impairments. At step three, the ALJ determined that Plaintiff's impairments did not meet  
3 or equal the requirements of a listed impairment. The ALJ then determined Plaintiff's residual  
4 functional capacity:

5 [C]laimant has the residual functional capacity to perform a full range of work at  
6 all exertional levels, except that the claimant should not climb ladders and should  
7 avoid heights and hazards. Further, regarding his mental capacity, the claimant  
8 retains the ability to perform simple, repetitive tasks that involve limited  
9 supervision, no public contact, and no prolonged or intimate contact with  
10 coworkers. Essentially, the claimant can perform jobs where he is given a simple  
11 assignment and then left to perform the work, with occasional checking by a  
12 supervisor .

13 Tr. 20.

14 At step four, the ALJ found Plaintiff unable to perform any of his past relevant work (Tr.  
15 24, Finding 6). At step five, relying on the testimony of the vocational expert and considering  
16 Plaintiff's age, education, work experience, and residual functional capacity, the ALJ found that  
17 Plaintiff could perform a significant number of jobs in the national economy, such as  
18 housekeeping cleaner and product assembler. Therefore, the ALJ found that Plaintiff was not  
19 disabled. On July 25, 2008, the Appeals Council denied Plaintiff's request for review, making  
20 the ALJ's decision the Commissioner's final decision subject to judicial review. 20 C.F.R. §§  
21 404.981, 416.1481, 422.210.

#### 22 STANDARD OF REVIEW

23 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of  
24 social security benefits when the ALJ's findings are based on legal error or not supported by  
25 substantial evidence in the record as a whole. Bayliss v. Barnhart, 427 F.3d 1211, 1214 (9th  
26 Cir.2005). "Substantial evidence" is more than a scintilla, less than a preponderance, and is such  
relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

1 Richardson v. Perales, 402 U.S. 389, 201 (1971); Magallanes v. Bowen, 881 F.2d 747, 750 (9th  
2 Cir.1989).

3 The ALJ is responsible for determining credibility, resolving conflicts in medical  
4 testimony, and resolving any other ambiguities that might exist. Andrews v. Shalala, 53 F.3d  
5 1035, 1039 (9th Cir.1995). While the Court is required to examine the record as a whole, it may  
6 neither reweigh the evidence nor substitute its judgment for that of the Commissioner. Thomas v.  
7 Barnhart, 278 F.3d 947, 954 (9th Cir.2002). When the evidence is susceptible to more than one  
8 rational interpretation, it is the Commissioner's conclusion that must be upheld. Id.

10 Plaintiff bears the burden of proving that he or she is disabled within the meaning of the  
11 Social Security Act (the “Act”). Meanel v. Apfel, 172 F.3d 1111, 1113 (9th Cir.1999) (*internal*  
12 *citations omitted*). The Act defines disability as the “inability to engage in any substantial  
13 gainful activity” due to a physical or mental impairment which has lasted, or is expected to last,  
14 for a continuous period of not less than twelve months. 42 U.S.C. §§ 423(d)(1)(A),  
15 1382c(a)(3)(A). Plaintiff is disabled under the Act only if his or her impairments are of such  
16 severity that he or she is unable to do her previous work, and cannot, considering her age,  
17 education, and work experience, engage in any other substantial gainful activity existing in the  
18 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B); Tackett v. Apfel, 180 F.3d 1094,  
19 1098-99 (9th Cir. 1999).

21 The Commissioner has established a five-step sequential evaluation process (noted  
22 above) to determine whether an individual is disabled as defined under the Social Security Act.  
23 20 C.F.R. §§ 416.920, 404.1520. Plaintiff has the burden of proof as to the first four steps; the  
24 Commissioner has the burden of proof on the fifth and final step. Bowen, 482 U.S. at 146 n. 5.  
25 The final or fifth step of the process is, in turn, divided into two parts. First, the Commissioner  
26

1 must assess the claimant's job qualifications by considering his physical ability, age, education,  
2 and work experience. Second, the Commissioner must determine whether jobs exist in the  
3 national economy that a person having the claimant's qualifications could perform. 42 U.S.C. §  
4 423(d)(2)(A); 20 C.F.R. §§ 416.920(g); 404.1520(g); Heckler v. Campbell, 461 U.S. 458, 460,  
5 103 S.Ct. 1952, 76 L.Ed.2d 66 (1983).

6 Here, Plaintiff argues, in his Opening Brief, the ALJ's erred in the following manner:

- 7 1. the ALJ erred when he did not find Mr. Percy had a severe Axis II disorder;
- 8 2. the ALJ failed to provide specific and legitimate reasons for rejecting the opinions of  
9 examining psychologist Dr. Daniel Neims; and
- 10 3. the ALJ did not give specific and legitimate reasons for rejecting the opinion of  
11 examining psychiatrist Dr. Elizabeth Koenig.

12 After carefully reviewing the briefing and record, the undersigned finds the ALJ's  
13 findings are properly supported by substantial evidence and without legal error. Specifically, the  
14 undersigned finds ALJ properly reviewed the medical evidence and his reasoning for accepting  
15 the opinion of Dr. Lysak, rather than Dr. Neims or Dr. Koenig, is properly supported by  
16 substantial evidence. The court should affirm the administrative decision.

## 17 **DISCUSSION**

### 18 ***A. The ALJ Properly Evaluated the Medical Opinion Evidence***

19 Plaintiff argues the ALJ failed to provide clear and convincing reasons for rejecting or  
20 discounting the opinions of Dr. Neims and Dr. Koenig. Rather than adopt either of these two  
21 medical opinions, the ALJ in this matter relied on the opinion of Dr. Lysak and Dr. Clifford's  
22 approval of Dr. Lysak's opinion to determine Plaintiff's residual functional capacity.  
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24 Dr. Lysak was a consulting or reviewing specialist, while Dr. Neims and Dr. Koenig were  
25 both examining, but not treating, physicians. The ALJ must provide "clear and convincing"  
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1 reasons for rejecting the uncontradicted opinion of either a treating or examining physician.  
2 Lester v. Chater, 81 F.3d 821, 830 (9th Cir.1996). Even when a treating or examining  
3 physician's opinion is contradicted, that opinion “can only be rejected for specific and legitimate  
4 reasons that are supported by substantial evidence in the record.” Id. at 830-31. However, the  
5 ALJ “need not discuss all evidence presented” to him or her. Vincent on Behalf of Vincent v.  
6 Heckler, 739 F.3d 1393, 1394-95 (9th Cir.1984) (citation omitted) (emphasis in original). The  
7 ALJ must only explain why “significant probative evidence has been rejected.” Id.

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9 In general, more weight is given to a treating physician's opinion than to the opinions of  
10 those who do not treat the claimant. Lester, 81 F.3d at 830. On the other hand, an ALJ need not  
11 accept the opinion of a treating physician, “if that opinion is brief, conclusory, and inadequately  
12 supported by clinical findings” or “by the record as a whole.” Batson v. Commissioner of Social  
13 Security Administration, 359 F.3d 1190, 1195 (9th Cir.2004); Thomas v. Barnhart, 278 F.3d 947,  
14 957 (9th Cir.2002); Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir.2001). An examining  
15 physician's opinion is “entitled to greater weight than the opinion of a nonexamining physician.”  
16 Lester, 81 F.3d at 830-31. A non-examining physician's opinion may constitute substantial  
17 evidence if “it is consistent with other independent evidence in the record.” Id. at 830-31;  
18 Tonapetyan, 242 F.3d at 1149.

19  
20 The ALJ is entitled to resolve conflicts in the medical evidence. Sprague v. Bowen, 812  
21 F.2d 1226, 1230 (9th Cir. 1987). He may not, however, substitute his own opinion for that of  
22 qualified medical experts. Walden v. Schweiker, 672 F.2d 835, 839 (11th Cir. 1982). If a  
23 treating doctor’s opinion is contradicted by another doctor, the Commissioner may not reject this  
24 opinion without providing “specific and legitimate reasons” supported by substantial evidence in  
25 the record for doing so. Murray v. Heckler, 722 F.2d 499, 502 (9th Cir. 1983). “The opinion of  
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1 a nonexamining physician cannot by itself constitute substantial evidence that justifies the  
2 rejection of the opinion of either an examining physician or a treating physician.” Lester, 81  
3 F.3d at 831. In Magallanes v. Bowen, 881 F.2d 747, 751-55 (9th Cir. 1989), the Ninth Circuit  
4 upheld the ALJ’s rejection of a treating physician’s opinion because the ALJ relied not only on a  
5 nonexamining physician’s testimony, but in addition, the ALJ relied on laboratory test results,  
6 contrary reports from examining physicians and on testimony from the claimant that conflicted  
7 with the treating physician’s opinion.  
8

9 There are no physical limitations presented in this matter, hence, the ALJ’s analysis is  
10 focused on Plaintiff’s non-exertional or mental limitations. In his decision, the ALJ noted and  
11 summarized the opinions from Dr. Neims, Dr. Koenig, Dr. Lenza, Shauna Potter, and Dr. Baer  
12 with respect to Plaintiff’s mental health. Tr. 12-17. Considering the medical evidence and  
13 record as a whole, the ALJ evaluated Plaintiff’s residual functional capacity (RFC) and found:  
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15 After careful consideration of the entire record, I find that the claimant has the  
16 residual functional capacity to perform a full range of work at all exertional  
17 levels, except that the claimant should not climb ladders and should avoid heights  
18 and hazards. Further, regarding his mental capacity, the claimant retains the  
19 ability to perform simple, repetitive tasks that involve limited supervision, no  
20 public contact, and no prolonged or intimate contact with coworkers. Essentially,  
21 the claimant can perform jobs, where he is given a simple assignment and then  
22 left to perform the work, with occasional checking by a supervisor.

23 Tr. 20.

24 The ALJ’s finding is properly supported by substantial evidence. On September 11,  
25 2006, Dr. Lysak, who is a state agency non-examining psychologist, reviewed the available  
26 medical evidence and assessed Plaintiff ‘s mental limitation (Tr. 273-286). Dr. Lysak assessed  
Plaintiff’s mental disposition considering schizophrenic, paranoid and other psychotic disorders,  
affective disorders, anxiety-related disorders, personality disorders, and substance addiction  
disorders. Dr. Lysak did not find any functional limitations associated with substance addiction,

1 but with respect to the other four categories of disorders (which included personality disorders)

2 Dr. Lysak found the following:

- 3 - mild restriction of activities of daily living;
- 4 - moderate difficulties in maintaining social functioning;
- 5 - moderate difficulties in maintaining concentration, persistence, or pace; and
- 6 - no episodes of decompensation.

7  
8 On January 25, 2007, Dr. Clifford reviewed and affirmed Dr. Lysak's evaluation (Tr. 331-332).

9 The ALJ's assessment of Plaintiff's residual functional capacity reflects Dr. Lysak's mental  
10 impairment evaluation and therefore, is properly supported by substantial evidence.

11 The ALJ accepted Dr. Lysak's review of Plaintiff's mental impairments rather than  
12 either Dr. Neims' or Dr. Koenig's assessment. On August 18, 2006, Dr. Neims, evaluated  
13 Plaintiff and diagnosed a personality disorder (Tr. 246). Dr. Neims saw Mr. Percy again on  
14 June 14, 2007. He diagnosed an avoidant personality disorder with borderline traits (Tr. 464).  
15 Dr. Neims concluded that Mr. Percy would have marked (very significant limitations) in his  
16 ability to respond appropriately to and tolerate the pressures and expectations of a normal work  
17 setting (Tr. 247, 224). In his June 14, 2007 examination, Dr. Neims found "Mr. Percy is seen as  
18 disabled from sustained gainful employment for the foreseeable 12 months or longer. . . His  
19 predominant difficulties with regard to sustained gainful employment include his ability to  
20 tolerate work stress, work cooperatively with coworkers and employers without avoidance and  
21 task abandonment, maintaining consistent and stable sense of self in the face of workplace  
22 stressors, and avoid decompensation into patterns of paranoid ideation anxiety and mood  
23 disruption" (Tr. 465).

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26 The ALJ addressed Dr. Neims opinion, stating:



1 I do not find his opinion or his conclusion persuasive. While Dr. Neims may  
2 offer an opinion regarding the claimant's functioning, ultimately, the issue of  
3 whether a claimant is disabled under the Social Security Regulations is an issue  
4 specifically reserved to the Commissioner. 20 C.F.R. § 404.1527; Social Security  
5 Ruling 96-5p. I also note, as discussed above, that the claimant was not honest  
6 with Dr. Neims regarding his use of substances. Namely, I note that the claimant  
7 presented to the hospital in September 2006 with alcohol related symptoms and  
8 also tested positive for cannabis. Also, despite the importance Dr. Neims placed  
9 on the claimant's alleged pain issues, the claimant reported as recently as  
10 November 2006 that he was in "good medical health and he is without any acute  
11 physical problems." Ex. 11F.20. I also note that previous testing showed that the  
12 claimant completed Trials A & B within normal limits, had an IQ above 85, and  
13 his cognition was intact despite some allegations of auditory hallucinations. See  
14 e.g. Ex. 2F.1. While there appears to be some merit regarding the claimant's  
15 difficulty getting along with others, I also note that the claimant interacted  
16 successfully with medical professionals, for the most part; had a girlfriend  
17 throughout the relevant period, visited with his brother, and lived with his  
18 girlfriend and a roommate. I also note that the claimant took care of his  
19 girlfriend's young children, contradicting Dr. Neims' conclusions regarding the  
20 claimant's inability to tolerate stress and tendency to abandon tasks. It appears  
21 that there is a certain element of volition involved, characterized as a disability  
22 conviction by the State agency, particularly with regard to task abandonment, as  
23 evidenced by the fact that the claimant persists with tasks when necessary, such as  
24 seeking out an apartment and caring for young children. Finally, while I have not  
25 assigned this opinion significant weight, I note that most of the issues raised by  
26 Dr. Neims are addressed in the above finding. For example, the claimant is  
limited to the performance of simple, repetitive tasks that involves very little  
sustained interaction with others.

Tr. 23.

Substantial evidence in the record, cited or referred to by the ALJ, supports the reasons  
the ALJ discounted Dr. Neims' opinion. For instance, in June 2007 Plaintiff denied any ongoing  
alcohol or drug abuse to Dr. Neims (Tr. 460). However, as noted by the ALJ, on September 28,  
2006, Plaintiff visited the emergency room with alcohol related symptoms (Tr. 386-87) and  
tested positive for marijuana (Tr. 389). Dr. Neims was not fully aware of Plaintiff's past use of  
drugs and alcohol. Moreover, Dr. Neims' report does not accurately reflect Plaintiff's social life  
with his girlfriend. Finally, Dr. Lysak's assessment of Plaintiff's mental limitations is  
inconsistent with Dr. Neim's more severe ratings and reasonably more consistent with the ALJ's

1 interpretation of the record as a whole. The ALJ's analysis of the record as a whole also  
2 included the assessment and opinion of Dr. Lenza, who reported that Plaintiff was only mildly  
3 limited by his mental impairments. The ALJ provided clear and convincing reasons to properly  
4 discount the opinion of Dr. Neims.

5         With regard to Dr. Koenig, a psychiatrist, the ALJ similarly discounted her opinion but to  
6 a lesser degree. Dr. Koenig evaluated Plaintiff on August 19, 2006, and she diagnosed a  
7 personality disorder not otherwise specified with obsessive compulsive and antisocial traits (Tr.  
8 265). At the time of the evaluation, Plaintiff reported living in his van, cooking meals in his  
9 parents' kitchen. Plaintiff reported occasionally visiting a couple of friends. Dr. Koenig  
10 reported that Plaintiff's concentration and persistence is impaired, but his pace is reasonable.

11 The ALJ addressed Dr. Koenig's opinion, stating:

12         In reaching the above [RFC] finding, I also considered the opinion of Dr. Koenig,  
13 but did not find it fully persuasive. In September 2006, Dr. Koenig opined that  
14 the claimant was "fairly anergic and poorly motivated;" thus, it was "quite  
15 unlikely that he would seek employment, maintain regular attendance, and work  
16 quickly and effectively." Ex. 3F.7. She also opined that the claimant would  
17 likely simply stop working when he began to feel overwhelmed, consistent with  
18 his previous work experiences. As explained above, the record evidences  
19 significant volitional involvement, as the claimant appeared to persist at tasks he  
20 found necessary. However, I note that I have limited the kind of tasks and the  
21 required interaction to address such concerns.

22 Tr. 23.

23         The ALJ's RFC accommodates most of Dr. Koenig's (and Dr. Neims') mental  
24 assessment. However, the ALJ properly rejected the more severe ratings or assessments, such as  
25 Dr. Koenig's comment that Plaintiff would be unable to maintain work when he felt  
26 overwhelmed. The ALJ referenced the same reasons for discounting Dr. Koenig's assessment  
as he did when he rejected Dr. Neims opinion. In addition, the ALJ states he has accommodated  
much of the concern, finding Plaintiff could not return to his past work and limited his

1 employment potential to tasks that required only simple assignments and little supervision. The  
2 undersigned finds no error in the ALJ's analysis of the medical evidence. As noted above, when  
3 the medical evidence presented is inconsistent the ALJ is entitle to resolve those differences.  
4 Moreover, it bears repeating that this court may neither reweigh the evidence nor substitute its  
5 judgment for that of the Commissioner. Thomas v. Barnhart, 278 F.3d 947, 954 (9th Cir.2002).  
6 When the evidence is susceptible to more than one rational interpretation, it is the  
7 Commissioner's conclusion that must be upheld. Id. The ALJ provided sufficient reasons to rely  
8 on Dr. Lysak, rather than Dr. Neims or Dr. Koenig. The ALJ's interpretation of the evidence  
9 was rational, and thus, the court should affirm the administrative decision.  
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11 ***B. The ALJ Properly Evaluated Plaintiff's "Severe" Impairments***

12 At step two, the ALJ found that depressive disorder, not otherwise specified; rule out  
13 bipolar disorder; anxiety disorder, and; rule out post-traumatic stress disorder were severe  
14 impairments. Plaintiff alleges the ALJ erred when he failed to discuss why he was not finding  
15 Mr. Percy had a severe personality disorder. Plaintiff asks the Court to remand this case for  
16 further proceedings to ensure that the symptoms and limitations arising from Mr. Percy's  
17 personality disorder are considered by the ALJ.  
18

19 Step-two of the administration's evaluation process requires the ALJ to determine  
20 whether an impairment is severe or not severe. 20 C.F.R. §§ 404.1520, 416.920 (1996). An  
21 impairment is "not severe" if it does not "significantly limit" the ability to do basic work  
22 activities. 20 C.F.R. §§ 404.1521(a), 416.921(a). The Social Security Regulations and Rulings,  
23 as well as case law applying them, discuss the step-two severity determination in terms of what  
24 is "not severe." According to the Commissioner's regulations, "an impairment is not severe if it  
25 does not significantly limit [the claimant's] physical ability to do basic work activities," 20  
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1 C.F.R. §§ 404.1520(c), 404.1521(a)(1991). Basic work activities are "abilities and aptitudes  
2 necessary to do most jobs, including, for example, walking, standing, sitting, lifting, pushing,  
3 pulling, reaching, carrying or handling." 20 C.F.R. § 140.1521(b); Social Security Ruling 85-  
4 28 ("SSR 85-28"). An impairment or combination of impairments can be found "not severe"  
5 only if the evidence establishes a slight abnormality that has "no more than a minimal effect on  
6 an individual's ability to work." Yuckert v. Bowen, 841 F.2d 303, 306 (9th Cir.1988)(adopting  
7 SSR 85-28).  
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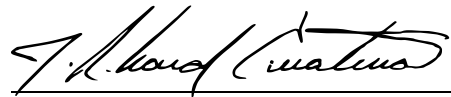
9 After reviewing the record, this court finds the ALJ properly considered the medical  
10 evidence, as discussed above. Included in the ALJ's consideration of the medical evidence was  
11 his analysis of Plaintiff's mental impairments, including a personality disorder. The ALJ did not  
12 list a personality disorder in his specific step two finding, i.e., the ALJ only listed depressive  
13 disorder, bipolar disorder, anxiety disorder and post traumatic stress disorder as severe  
14 impairments (Tr. 12). However, as discussed and noted above the ALJ specifically relied on Dr.  
15 Lysak's assessment of Plaintiff's mental impairments, and Dr. Lysak specifically included a  
16 personality disorder in his review and evaluation of Plaintiff's limitations. The ALJ's RFC  
17 incorporated Dr. Lysak's evaluation of Plaintiff's mental limitations. It is clear to this court that  
18 the ALJ's properly considered and incorporated all of Plaintiff's mental limitations, including a  
19 personality disorder when he evaluated Plaintiff's residual functional capacity and his ability to  
20 perform work in the national economy. Accordingly, the court finds no error at step-two.  
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### 23 CONCLUSION

24 Based on the foregoing discussion, the Court should affirm the administrative decision.  
25 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal rules of Civil Procedure, the  
26 parties shall have ten (10) days from service of this Report to file written objections. *See also*

1 Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for  
2 purposes of appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit  
3 imposed by Rule 72(b), the clerk is directed to set the matter for consideration on **May 1, 2009**,  
4 as noted in the caption.

5 DATED at this 10<sup>th</sup> day of April, 2009.  
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9 J. Richard Creatura  
10 United States Magistrate Judge  
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